IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-748

P. J. CULLERTON, et al.,

Petitioners,

vs.

FULTON MARKET COLD STORAGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5460,

Counsel for Petitioners.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

HENRY A. HAUSER,
Assistant State's Attorney,

Of Counsel.

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

P. J. CULLERTON, et al.,

Petitioners,

vs.

FULTON MARKET COLD STORAGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners P. J. Cullerton, Thomas M. Tully, George M. Keane, Bernard J. Korzen, Harry H. Semrow and Seymor Zaban* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 7, 1978.

---

* Petitioner Cullerton was the Assessor of Cook County for many years until he was succeeded in 1974 by the present Assessor of Cook County, Thomas M. Tully. Petitioners Semrow and Zaban are the present members of the Cook County Board of (Tax) Appeals. Petitioners Keane and Korzen are past members of that board. These petitioners will be hereinafter referred to as the county assessment officials.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A hereto. The opinion of the District Court, not yet reported, appears as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 7, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Anti-Tax Injunction Act of 1937 (28 U.S.C. § 1341) prohibits a civil rights action for damages caused by the overassessment of real estate for purposes of local taxation.

2. Whether principles of comity and federalism require the District Court to abstain from a civil rights action for damages caused by the overassessment of real estate where there are adequate state anticipatory and compensatory remedies.

3. Whether allegations of overassessment of real estate for local taxation purposes, without more, state a claim for relief under the Civil Rights Act (42 U.S.C. § 1983).

FEDERAL STATUTES PROVIDE IN PERTINENT PART

Title 28 U.S.C.

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Title 42 U.S.C.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case presents the question whether the Federal Anti-Tax Injunction Act (28 U.S.C. § 1341) and its underlying policy prohibit a § 1983 civil rights action against county assessment officials for damages arising from alleged overassessment* of a cold storage warehouse.

The case is presented upon the pleadings only, since the District Court granted petitioners' motion to dismiss. The well-pleaded allegations of the amended complaint thus form the factual basis for the determination of the issues. *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-75 (1965).

The respondent (sometimes hereinafter referred to as taxpayer) is an Illinois corporation which owns a cold storage warehouse subject to the local real estate tax assessed by the petitioning county assessment officials during the years 1958 through 1973. The taxpayer alleges that its property was assessed at 100% of its fair market value while other property in Cook County was assessed at between 20% to 50% of fair market value. (Pars. 12-14, Amended Complaint; a copy of the taxpayer's Amended Complaint, taken from the Appendix filed in the Seventh Circuit, is included herewith as appendix C.)

The following damage is alleged in the amended complaint, par. 15:

> The foregoing illegal acts and course of conduct have damaged plaintiff. Such damages include, *inter alia*, the amount (over $60,000) by which the tax levy for 1969 on plaintiff's property exceeded the levy which would have obtained but for such acts and conduct, the sums expended by plaintiff in the years from 1958 to 1974 in seeking redress from such acts and conduct, and the dislocation to plaintiff's business resulting therefrom.

and the following relief requested:

> WHEREFORE, plaintiff prays:
>
> (a) For judgment against the defendants, and each of them, for $60,000 plus the sums expended by plaintiff in the years 1958 through 1974 in seeking redress from the acts and conduct of defendants, plus the damage to plaintiff's business resulting therefrom, plus its cost.
>
> (b) For punitive damages in the amount of $250,000.
>
> (c) For such other and further relief as may be just.

The county assessment officials moved to dismiss the amended complaint. Those motions are set out herein as appendices D and E. Those motions set up the following grounds in opposition to the taxpayer's amended complaint:

1. Real estate tax assessments do not fall within the purview of 28 U.S.C. § 1343 and 42 U.S.C. § 1983.
2. The court should abstain from jurisdiction.
3. Jurisdiction is barred by 28 U.S.C. § 1341.
4. Failure to state a claim.
5. Failure of the amended complaint to present a substantial federal question.
6. The amended complaint as to tax year 1969 was barred by the final decision of the Illinois Supreme Court in *People ex rel. Korzen v. Fulton Market Cold Storage Co.*, 62 Ill. 2d 443, 343 N.E.2d 450 (1976)
7. The amended complaint failed to state a claim upon which relief may be granted, to wit: the assessment practices challenged by the plaintiff are neither the product of invidious discrimination, nor

* The term "overassessment" in this petition is used in the general sense of a taxpayer being compelled to pay more than his appropriate share of taxes due to erroneous valuation of the taxpayer's property or other property in the taxpayer's district.

are they based upon an unreasonable classification of property for the purposes of taxation.

In ruling on the motions the District Court stated:

> From an examination of the amended complaint, it appears that plaintiff is asking this court to interject itself into the realm of state procedures of taxation, to find that the manner in which assessments were made were illegal, and to order relief in violation of principles underlying 28 U.S.C. § 1341. After consideration of the motions and briefs of the parties, the court concludes that plaintiff's amended complaint must be dismissed.
>
> Appendix B, at 21a

and,

> Therefore, in the judgment of this court, the principles underlying enactment of 28 U.S.C. § 1341 apply to bar this suit. Plaintiff seeks relief in this court without having availed itself to all plain, speedy, and efficient remedies provided by Illinois administrative and judicial procedures.
>
> Appendix B, at 22a

The taxpayer appealed to the Court of Appeals for the Seventh Circuit, which reversed. In ruling on the issue the Court of Appeals stated:

> A federal court injunction or declaratory judgment would not only undermine and jeopardize a state's ability to collect its revenue but would also seriously damage the delicate balance inherent in our federalistic system of government.
>
> These concerns are not present in a suit for damages.
>
> Appendix A, at 12a

A close and fair reading of the taxpayer's amended complaint discloses three factors which set it apart from other § 1983 damage actions and from the usual tax injunction suit.

First, the amended complaint has as its sole subject matter the alleged overassessment of the taxpayer's

property. The taxpayer fails to allege that the "discrimination" to which it concludes it is subject is based on anything other than overassessment of its real estate. This conclusion arises from the fact that the plaintiff is a corporation, and that the property involved is a cold storage warehouse. Usual notions of discrimination on the basis of a plaintiff's sex, race, religion or other characteristic simply do not apply to cold storage warehouses. This is so even though the taxpayer has cast the amended complaint in the grand conclusions of "invidious" and "systematic" discrimination. This Court has often looked past such unsupported and unwarranted pleader's conclusions in the past, *Snowden v. Hughes*, 321 U.S. 1, 9-10 (1944), cited in *28 East Jackson v. Cullerton*, 523 F.2d 439, 441 n.2 (7th Cir. 1975), and should do so now. In fact, the amended complaint seeks compensatory damages in the form of a refund, costs of ". . . seeking redress" and "business dislocation". It is clear that the taxpayer's case is bound up totally in an attempt to set right the alleged overassessment of its property. No purposeful or intentional discrimination is alleged other than the assessment iself. It is this factual pattern which takes the case outside the usual civil rights claim, and requires dismissal under *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68 (1900).

Secondly, the amended complaint fails to allege resort to the Illinois remedies available to correct an overassessment of real estate.*

---

* Illinois provides at least the following remedies to a taxpayer whose real estate is overassessed.

1. Administrative, pre-assessment—The assessor cannot increase a real estate assessment in a non-quadrennial year without first giving the taxpayer notice of such proposed increase and right to be heard thereon. See Ch. 120, par. 578, 579 Ill. Rev. Stat. 1977; *Goodfriend v. Board of Appeals*, 18 Ill. App. 3d 412, 305 N.E.2d 404 (1st Dist. 1973).

(Footnote continued on following page)

Thirdly, the amended complaint fails to allege that the remedies provided by Illinois law are not plain, speedy and efficient within the meaning of the Federal Anti-Tax Injunction Act, and the many cases inter-

* *continued*

2. Administrative post-assessment—The assessor has discretion upon application by the taxpayer to offer a certificate of error in certain situations. See Ch. 120, par. 604, Ill. Rev. Stat. 1977.

3. Administrative—assessment review—Prior to issuance of the tax bills, the Board of Appeals of Cook County has statutory power to review assessments and order them corrected. See Ch. 120, pars. 594, 598, Ill. Rev. Stat. 1977; *People ex rel. Korzen v. Fulton Market Cold Storage*, 62 Ill. 2d 443, 343 N.E.2d 450 (1976).

4. Statutory legal remedy—With payment under protest and exhaustion of administrative remedies, a taxpayer may file an objection to the collector's application for judgment and sale of delinquent real estate. The circuit court possesses the power in this proceeding to determine whether the assessment is correct. See Ch. 120, pars. 675, 716. Ill. Rev. Stat. 1977; *LaSalle National Bank v. County of Cook*, 57 Ill. 2d 318, 312 N.E. 2d 252 (1974).

5. Injunctive Relief—A taxpayer may obtain injunctive relief when the legal remedy is unavailable. *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E.2d 299 (1973); *28 East Jackson Enterprises v. Cullerton*, 523 F.2d 439 (7th Cir. 1975); *cert. denied* 423 U.S. 1073 (1976). Supplemental opinion upon Denial of Rehearing, 551 F.2d 1093 (7th Cir. 1976) *cert. denied* 434 U.S. 835 (1977).

6. The remedies available to a taxpayer in Illinois would appear to include a 42 U.S.C. § 1983 claim which could be appended to the taxpayer's claim for a refund in the state court. Ch. 120, pars. 675, 716, Ill. Rev. Stat. 1977. The Illinois Appellate Court for the District in which the taxpayer's property is located has stated that, " . . . the courts of the State of Illinois have concurrent jurisdiction with the Federal courts to hear claims founded upon alleged violations of 42 U.S.C. 1983." *Alberty v. Daniel*, 25 Ill. App.3d 291, 295, 323 N.E.2d 110 (1st Dist. 1974).

preting its provisions.* It is, of course, not surprising that the taxpayer failed to assert the latter two points since to do so would have, under its theory of the case, impliedly admitted that the Anti-Tax Injunction statute was applicable to its § 1983 damage action.

The county assessment officials contend that this case presents "discrimination" solely in terms of overassessment; is devoid of purposeful or systematic discrimination as to race, sex, or other characteristics; seeks damages in terms of refund and costs of suit against local tax officials**; and fails to allege resort to Illinois' plain, speedy and efficient remedies. This case, it is respectfully submitted, is one which comes clearly within ambit of the Anti-Tax Injunction Act. If not, then Illinois taxpayers are enabled, by the simple strategem of a § 1983 damage action, to evade or abandon the panoply of administrative, legal and injunctive remedies provided by Illinois in favor of the newly created federal forum. The ruling of the court below thus presents the clear prospect of a vastly increased District Court caseload composed mainly of cases which have heretofore been litigated in the courts of Illinois. It is obvious, too, that such a jurisdictional dislocation of cases cannot help but diminish the respect to which Illinois' remedies are entitled.

* See, *28 East Jackson Enterprises, Inc. v. Cullerton*, 523 F.2d 439 (7th Cir, 1975), *cert. denied* 423 U.S. 1073, *reh. denied* 424 U.S. 959 (1976); *2nd pet. reh. denied* 551 F.2d 1093 (1976); *cert. denied* 434 U.S. 835 (1977); *Tully v. Griffin*, 429 U.S. 68 (1976).

** While the amended complaint seeks personal judgments against the various named county assessment officials, it is clear under the circumstances of this case that funds to satisfy such judgments will come from the county treasury. This Court has recognized this governmental fact of life in *Edelman v. Jordan*, 415 U.S. 651 (1974), a case which, of course, does not apply directly to county officials.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in conflict with the rule expressed by the Fifth Circuit in the leading case of *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973) and similar cases from the Second and Ninth Circuits regarding the effect of the Anti-Tax Injunction Act upon damage claims brought under the Civil Rights Act.*

The decision of the Court of Appeals is in conflict with this Court's decision in *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293 (1943).

The decision of the Court of Appeals is in conflict with this Court's holding in *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68 (1900) that constitutional challenges to a state tax assessment fail to state a claim under the Civil Rights Act.

* These cases include *Hickmann v. Wujick*, 488 F.2d 875 (2nd Cir. 1973); *Kelly v. Springett*, 527 F.2d 1090 (9th Cir. 1975).

I.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE RULE EXPRESSED BY THE FIFTH CIRCUIT THAT DAMAGE ACTIONS UNDER THE CIVIL RIGHTS ACT ARE WITHIN THE PROHIBITION OF THE ANTI-TAX INJUNCTION ACT.

The court below correctly and clearly characterized the issue as ". . . whether 28 U.S.C. § 1341 or its underlying policy considerations bar the plaintiff's § 1983 suit for damages." Appendix A, at 3a. However, the statement immediately following, that ". . . it appears that no other court has ever directly addressed itself to this precise question." is clearly incorrect.

The Fifth Circuit has, in its leading decision of *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), ruled that ". . . it is the duty of federal courts, in actions for the refund of state taxes, to defer to state administrative and judicial remedies where the state remedy is 'plain, speedy and efficient'." 463 F.2d at 27-28. As will be demonstrated later, this rule appears to be supported by the weight of authority and by the force of the logic behind § 1341.

The threshold matter of the characterization of the claim needs clarification since the taxpayer maintained below that the amended complaint did not seek a "refund" but rather "tort damages." The Court of Appeals appears to have accepted this distinction sub silentio, since the *Bland* case was cited for the proposition by the county assessment officials but ignored by the court below. However, semantic debate is unnecessary because of the clear facts of *Bland v. McHann*. In that case certain black property owners filed suit alleging racial discrimination in their real estate tax assessments. The court noted that "Taxpayers also

sought a money judgment amounting to a full return plus interest of previously collected ad valorem taxes which were alleged to be unconstitutionally and discriminatorily assessed." 463 F.2d at 23, n.2.

It is clear that the term "refund" used in *Bland v. McHann* is not limited simply to a return of money authorized under state law,* but rather includes the full scope of relief which a federal court may find appropriate in repairing the damage done to a taxpayer whose property is overassessed. Therefore *Bland v. McHann* squarely decided that the Federal Anti-Tax Injunction Act foreclosed not only the equitable remedy of injunction and anticipatory remedy of declaratory judgment but also the compensatory remedy of damages.

To permit the taxpayer to bifurcate its claim for relief by affording it the strategem of foregoing equitable, anticipatory or compensatory relief available in the state court, with the later filing of a federal damage action to recoup "tort damages" stands the legislative intent of § 1341 on its head. If taxpayer's "tort damage" theory has any force, then § 1341 has no meaning at all.

The concern expressed by the Court of Appeals that application of the Anti-Tax Injunction Act would immunize the county assessment officials from civil rights violations confuses the nature of this action, which is based entirely upon assessment, with an action alleging a purposeful attempt to discriminate on the

* The cause of this confusion, which is injected into the case by the taxpayer, may well derive from the pre-1937 practice of invoking diversity jurisdiction to assert refund claims founded on state tax law. See *Garrett v. Bamford*, 538 F.2d 63, 66 (3d Cir. 1976).

basis of sex, race, religion, or politics, which is clearly not alleged in the amended complaint. There is no immunity for tax assessors who employ assessment machinery to carry out purposeful discrimination. But that is simply not the case here.

A rule identical to *Bland v. McHann* has been developed independently by the Second Circuit. In *Hickmann v. Wujick*, 488 F.2d 875 (2d Cir. 1973) the Court of Appeals for the Second Circuit ruled on a tax exemption case seeking ". . . declaratory judgment, damages and injunctive relief . . . .". *Id.* at 876. The Second Circuit stated:

> We concluded in *American Commuters Association v. Levitt*, 405 F.2d 1148, 1151 (2 Cir. 1969), that "when there are adequate state remedies available, Section 1341 means what it so plainly says and that federal jurisdiction is still precluded by it". Basing a complaint upon alleged violation of civil rights, 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 or of the Federal Constitution will not avoid the prohibition contained in Section 1341.

Hickmann, at 876.

Evangelical Catholic Communion Inc. v. Thomas, 373 F.Supp. 1342 (D.Vt. 1973) *aff'd, unpublished opinion* 493 F.2d 1397 (2nd Cir. 1974) presents a clear example of the conflict which the decision of the Court of Appeals for the Seventh Circuit has created. The *Thomas* case was ". . . brought to challenge the assessment of local property taxes against property claimed by the plaintiff to be entitled to exemption from taxation by virtue of its religious use." *Id.* at 1343.

The District Court ruled that § 1341 clearly barred the injunctive and declaratory portions of the § 1983 action. Regarding the taxpayers' refund claim the District Court stated:

> Next, plaintiffs seek reimbursement from the town of Newbury for the taxes they paid under the challenged assessments from 1969 through 1971. This aspect of their claim is also barred by 28 U.S.C. § 1341. We are in accord with the cogent opinion of the Fifth Circuit Court of Appeals in *Bland v. McHann*, 463 F.2d 21, 25-28 (5th Cir. 1972), that under § 1341 "it is the duty of federal courts, in actions for the refund of state taxes, to defer to state administrative and judicial remedies where the state remedy is 'plain, speedy and efficient.' " *Id.* at 27-28.

Evangelical Catholic Communion, at 1344.

The court further stated that:

> Finally, the plaintiffs seek additional damages totaling $150,000.00. It is elementary that constitutional rights must be found to have been abridged in order for damages to be recovered in a civil rights action. Thus the plaintiffs in this action cannot recover damages without a determination by this court that the taxation of their Newbury property was effected in violation of their constitutional rights. If we were to make such a determination, we would, in effect, be issuing a declaratory judgment regarding the constitutionality of the tax levied on the plaintiffs. As the court is prohibited from issuing such a declaratory judgment, as indicated earlier, the court is also precluded as a matter of law from adjudicating the plaintiffs' damages claims. This final segment of their complaint, therefore, must be dismissed.

Id. at 1344.

The rule followed by the District Court was so well established that the Court of Appeals for the Second Circuit did not even view it necessary to publish its opinion affirming the District Court. 493 F.2d 1397 (2nd Cir. 1974).

The Ninth Circuit's continued acceptance of the rule in *Bland* is set forth in *Kelly v. Springett*, 527 F.2d 1090 (9th Cir. 1975). The court stated:

> *Bland v. McHann*, 463 F.2d 21 (CA5 1972), cert. denied 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973), stands for the tenet that § 1341 applies to suits for refunds, as well as to anticipatory relief. The *Bland* court also held that an action for refund was an integral part of state tax administration and that there was not reason to bifurcate the state remedy. *Id.* at 27. We agree with both conclusions. The *Bland* decision has been recently affirmed in *United States v. State Tax Comm'n*, 505 F.2d 633, 638 (CA5 1974). Interestingly enough, we cited *Bland* with approval in *Mandel v. Hutchinson*, 494 F.2d 364, 367 (CA9 1974), where we held that the California tax refund procedure provides a plain, speedy and efficient remedy. It is true that appellant's action is brought under 42 U.S.C. § 1983, the jurisdictional statute of which is 28 U.S.C. § 1343(3) and, consequently, does not require prior exhaustion of remedies. However, where § 1343(3) actions are confronted with the § 1341 provision, the latter control and exhaustion of state remedies is required. *Bland v. McHann*, supra, pp. 24-25; *Mandel v. Hutchinson, supra*, p. 367. *Cf. Lynch v. Household Finance Corp.*, 405 U.S. 538, 542-543, n. 6, 92 S. Ct. 1113, 31 L.Ed. 424 (1972).

Kelly, at 1094.

This case clearly demonstrates that the Seventh Circuit is out of step with other Circuits on a question of law vital to both federal and state courts.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *GREAT LAKES DREDGE & DOCK CO. V. HUFFMAN*, 319 U.S. 293 (1943).

The county assessment officials suggest that review by this Court is warranted because the court below misperceived the letter and the spirit of the *Great Lakes* case.

In its decision the court below stated:

> After reviewing the statute, its legislative history and significant cases we can find no evidence which would indicate that § 1341 was directed at damage actions as well as equitable actions. Clearly if Congress had intended to prohibit all federal court relief in state tax matters, it could have done so. Congress, however, did not address the subject of damage actions. Congress thus did not give state tax officials absolute immunity for acts committed in their official capacity. Congress only prohibited certain specific remedies which due to their nature are highly disruptive of state proceedings. Quite clearly, if a county or state tax official intentionally and unjustifiably raised an individual's property assessment merely because of the individual's race, ethnic background or political affiliation, the official could be liable for damages under § 1983 for the misuse of his authority.
>
> Appendix A, at 14a

The error of the foregoing analysis is that it inflates the taxpayer's claim here, which is one of overassessment, to a constitutional dimension (such as a claim based on race, politics or ethnic background) and then supposes that the county assessment officials seek immunity from such wrongful acts. It is clear that the facts of this case do not implicate highly valued and protected rights limiting discrimination based on race, politics or national origin. Rather the county assessment officials maintain that where there is overassessment, Illinois provides a system of legal and equitable remedies for the adjustment of such claims. Far from being immune from such claims, the county spends substantial amounts of time and resources on such tax matters, and stands ready to remedy the damage of an overassessment. It is clearly not the position of these county officials that they can wield the tax

assessment or collection power in a manner which intentionally violates rights of persons to freedom from discrimination based on race, sex, religion, politics or other grounds. But that is not the case presented to the Court of Appeals or to the District Court. The case here is for overassessment of a corporately owned cold storage warehouse, and nothing else. If that claim can be litigated as a tort damage claim under § 1983, then why not overassessment of any parcel of property in Cook County?

Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293 (1943) militates against such a rule. Many cases trace the narrowing of federal equity jurisdiction in state tax cases effected by *Matthews v. Rogers*, 284 U.S. 521 (1932); the rise of the use of diversity and federal question jurisdiction to delay payment of state taxes; and the consequent limitation set by Congress on such actions by the passage of the Federal Anti-Tax Injunction Act of 1937 (28 U.S.C. § 1341).* However it was the passage of the Federal Declaratory Judgment Act of 1934, and consequent attempts by state taxpayers to avoid the bar of the Anti-Tax Injunction Act which formed the background for the *Huffman* decision. This Court said that:

---

* See *Garrett v. Bamford*, 538 F.2d 63, 66-67 (3rd Cir. 1976) held § 1341 inapplicable to racially discriminatory assessment methods because Pennsylvania law presented no " . . . plain, speedy and efficient remedy" for such a challenge; *Tramel v. Schrader*, 505 F.2d 1310, 1315-16 (5th Cir. 1975) held § 1341 applicable to § 1983 suit to enjoin "special assessment" since such was a tax, and remedies were adequate to challenge it. *Hargrave v. McKinney*, 413 F.2d 325-26 (5th Cir. 1969) held § 1341 inapplicable to § 1983 for declaration of effectiveness of Florida tax rollback statutes. But see *Askew v. Hargrave*, 401 U.S. 476 (1971) vacating subsequent three judge court ruling in favor of taxpayer so that Florida courts could rule on state claims.

> The earlier refusal of federal courts of equity to interfere with the collection of state taxes unless the threatened injury to the taxpayer is one for which the state courts afford no adequate remedy, and the confirmation of that practice by Congress, have an important bearing upon the appropriate use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes.

319 U.S. at 299.

Thus this Court tied the use of the "new form of procedure", declaratory judgment, to the familiar rule applied in cases where equitable relief was sought against the collection of a state tax. The Court stated the rationale for this rule clearly:

> The considerations which persuaded federal courts of equity not to grant relief against an alleged unlawful state tax, and which led to the enactment of the Act of August 21, 1937, [Federal Anti-Tax Injunction Act] are persuasive that relief by way of declaratory judgment may likewise be witheld in the sound discretion of the court. With due regard for these considerations, it is the court's duty to withold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.

319 U.S. at 300-01 [Insert for clarity].

The county officials submit that the very same state interests and concerns which inhere in a declaratory judgment action regarding state tax liability also exist in a § 1983 damage action.

There are two specific reasons why the rule of *Great Lakes* as to declaratory judgments should apply to § 1983 damage claims for overassessment. First this Court recognized that the Declaratory Judgment Act of 1934 did not simply authorize ". . . a declaration of rights . . . although no further relief be asked . . . .". *Great Lakes* at 300. If this were the case, the potential for direct harm to the state's tax system, though great, would be limited. However, this Court clearly pointed out that, in the words of the Declaratory Judgment Act, "*Further relief* based on a declaratory judgment or decree may be granted whenever necessary and proper." *Id.* at 300 (Emphasis supplied). Thus the question of damages is subsumed into the holding of *Great Lakes.* Secondly, it has been recognized that an award of damages based on overassessment implies a declaration of unconstitutionality. This is precisely the holding of *Evangelical Catholic Communion, Inc. v. Thomas,* 373 F.Supp. 1342, 1344 (D.Vt. 1973); *aff'd unpublished opinion* 493 F.2d 1397 (2nd Cir. 1974).

The county assessment officials submit that the departure of the Seventh Circuit from the rule in *Great Lakes* warrants review by this Court.*

---

* Prior to the ruling in the case at bar the Seventh Circuit has adhered closely to the *Great Lakes* holding. See *Gray v. Morgan,* 371 F.2d 172 (7th Cir. 1966); *Miller v. Bauer,* 517 F.2d 27 (7th Cir. 1975); *Illinois Central Railroad Co. v. Howlett,* 525 F.2d 178 (7th Cir. 1975), *cert. denied* 424 U.S. 976 (1976).

III.

THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THIS COURT'S HOLDING IN *HOLT v. INDIANA MANUFACTURING CO.*, 176 U.S. 68 (1900) THAT CONSTITUTIONAL CHALLENGES TO A STATE TAX ASSESSMENT FAIL TO STATE A CLAIM UNDER THE CIVIL RIGHTS ACT.

The Cook County assessment officials maintain that there is a "special class of cases" represented by *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68 (1900), which hold that the Civil Rights Act is not applicable in cases involving ". . . constitutional challenges to the collection of state taxes." See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 n.6 (1972).

The facts in *Holt* and the case at bar are startlingly similar. In *Holt* the local tax officials assessed the personal property of the Indiana Manufacturing Co. for the purposes of taxation. The corporation maintained that the value of the property was solely represented by certain patents allegedly not subject to taxation. The *nisi prius* court, the Federal Circuit Court for the District of Indiana, entered a decree of injunction against the collection of the tax.

In ruling on the issue of jurisdiction, this Court referred to the provisions of the Civil Rights Act of 1871, the predecessor to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, and stated:

> "Assuming that they are still in force, it is sufficient to say that they refer to civil rights only, and are inapplicable here." *Holt*, 176 U.S. at 72.

The Court ruled finally that, while federal question jurisdiction was asserted, the jurisdictional amount was not pleaded. The lower court's ruling was therefore reversed.

These county assessment officials specifically disavow any argument as to the applicability of the Civil Rights Act based upon the supposed distinction between personal rights, as against property rights, since the argument was clearly and soundly rejected in *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972). However, *Holt* is still good civil rights decisional law on the question whether overassessment alone, and without implication of racial, sexual, religious, ethnic or political discrimination, states a civil rights claim. We contend that mere overassessment, even if systematic in the sense that all assessments of real estate are organized, does not state a claim under 42 U.S.C. § 1983. It should be clear that "garden variety" overassessment claims were not what concerned the Congress when it passed the civil rights act.

It is submitted that the foregoing conceptual approach to the claim of overassessment will protect state tax remedies from unpredictable changes in a body of civil rights law which is clearly aimed at solving different, difficult problems presented in our society. Viewed in this light, even if 28 U.S.C. § 1341 were inapplicable, the claim of overassessment itself would be rejected on the basis of *Holt*.

CONCLUSION

This Court has recently stated in *Tully v. Griffin*, 429 U.S. 68 (1976) that "A federal court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost."

The case at bar alleges an overassessment of property for which the State of Illinois has provided plain, speedy and efficient remedies. To hold, as did the Court of Appeals for the Seventh Circuit, that § 1341 is inapplicable to a § 1983 damage action arising out of an overassessment constitutes just such an interference, and should be reviewed by this Court. For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5460,
Counsel for Petitioners.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

HENRY A. HAUSER,
Assistant State's Attorney,
Of Counsel.

November 3, 1978

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-2133

FULTON MARKET COLD STORAGE COMPANY,

Plaintiff-Appellant,

v.

P. J. CULLERTON, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-C-5—**George N. Leighton**, *Judge.*

ARGUED FEBRUARY 15, 1978—DECIDED AUGUST 7, 1978

Before SWYGERT and TONE, *Circuit Judges,* and SHARP*, *District Judge.*

SHARP, *District Judge.*

I.

On January 2, 1974 Fulton Market Cold Storage Company ("Fulton") filed a civil rights damage action against the Cook County Assessor under 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343(3). Later Fulton amended its complaint and

* The Honorable Allen Sharp, United States District Court for the Northern District of Indiana, is sitting by designation.

added a number of defendants and counts. In its amended complaint Fulton, a Cook County Illinois property owner, seeks actual and punitive damages for injuries allegedly inflicted upon it by county and state taxing officials. Fulton charges that these defendants, individually and as parties to a continuing conspiracy, acted and combined under color of law to deprive it of its rights under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, the due process provisions of the Illinois Constitutions of 1870 and 1970, Article IX, Section 1 of the Illinois Constitution of 1870, and various provisions of the Illinois Revenue Act, 120 Ill. Rev. Stat. §§ 482 *et seq.*

Specifically, Fulton alleges that from 1958 to 1973, the defendants have systematically, knowingly, intentionally, fraudulently and invidiously assessed its property at levels other than permitted by law and greatly in excess of the levels at which property in Cook County was generally assessed in those years. Fulton alleges that in 1968 and 1969 its property was deliberately assessed at two and one-half times the level at which property was generally assessed in Cook County in those years. Fulton's other allegations charge that the defendants' system of illegal valuations and discriminatory assessments has been widely, wilfully and purposefully practiced in Cook County and has worked substantial injury upon Fulton.

The defendants fall into three groups: (1) Cook County Assessors P. J. Cullerton and Thomas M. Tully ("the Assessor Defendants") who, by statute, had the duty to assess real property in Cook County; (2) Cook County Board of Appeals members ("the County Defendants") who, by statute, had the duty to review and order corrected unlawful assessments brought before them on complaint; and (3) Directors of the Illinois Department of Revenue and the Illinois Department of Local Government Affairs ("the State Defendants") who, by statute, had the duty to equalize the total assessed valuations of the several counties so that such total assessed valuations as equalized equaled the full cash value of the property subject to assessment within the

several counties and the duty to order a reassessment for any year in which they found that the assessments in any county were not in substantial compliance with the law.

For relief, Fulton's amended complaint prays for $60,000 plus the sums it has expended in the years 1958 through 1974 in seeking redress from the acts and conduct of the defendants, plus the damage to its business resulting therefrom and punitive damages.

The district court dismissed the plaintiff's amended complaint relying upon 28 U.S.C. § 1341 and its underlying policy considerations. Fulton appealed and the matter is now before this court.

II.

The central issue now before this court is whether 28 U.S.C. § 1341 or its underlying policy considerations bar the plaintiff's § 1983 suit for damages. After a careful review of all the authority cited by counsel and after an independent search for authority by this court, it appears that no other court has ever directly addressed itself to this precise question. This court and several others have construed § 1341 in cases where the plaintiff was seeking some form of equitable relief, e.g., injunctive or declaratory actions. But no case has been found where this statute was extended to damage actions as well. Consequently, since this appears to be a case of first impression, this court must analyze § 1341 with reference to its legislative history and the significant cases which have construed the statute in order to determine the important underlying policy considerations. Only then may this court properly resolve the issue.

III.

28 U.S.C. § 1341

Title 28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under the State law where a plain, speedy and efficient remedy may be had in the courts of such State.

As this court has held in the past, this statute clearly prohibits a district court from issuing an injunction which would "suspend or restrain the assessment, levy or collection of any tax under State law" unless the State remedy is not "plain, speedy and efficient." *28 East Jackson Enterprises, Inc. v. Cullerton*, 551 F. 2d 1093 (7th Cir. 1977) (on second petition for rehearing); *see also 28 East Jackson Enterprises, Inc. v. Cullerton*, 523 F. 2d 439 (7th Cir. 1975); *Pintozzi v. Scott*, 436 F. 2d 375 (7th Cir. 1970); *Tramel v. Schrader*, 505 F. 2d 1310 (5th Cir. 1975); and *Bland v. McHann*, 463 F. 2d 21 (5th Cir. 1972).

Additionally, despite the fact that § 1341 speaks only of injunctions, this court has held that the statute also bars declaratory actions. *Illinois Central R. Co. v. Howlett*, 525 F. 2d 178 (7th Cir. 1975); *Gray v. Morgan*, 371 F. 2d 172 (7th Cir. 1966). *See also Perez v. Ledesma*, 401 U.S. 82 (1971) (Brennan, J., concurring in part and dissenting in part); *Hickmann v. Wujick*, 488 F. 2d 875 (2d Cir. 1973); *American Commuters Ass'n v. Levitt*, 405 F. 2d 1148 (2d Cir. 1969).

While it is well settled that § 1341 may bar equitable relief, injunctive and declaratory, it is uncertain whether the policy considerations which underlie § 1341 may also bar an action for damages. To resolve this question properly it is important to examine the legislative history and congressional intent of § 1341.

Legislative History

The Fifth Circuit in *Hargrave v. McKinney*, 413 F. 2d 320 (1969), explained the context in which § 1341 was enacted:

> The expansion of the federal judicial power countenanced by the Supreme Court in Ex parte Young, 1908, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714, "brought about a major shift in the actual distribution of power between states and nation" which was not "overlooked by Congress, or by the spokesmen of the interests adversely affected." H. Hart and H. Wechsler, The Federal Courts and Federal System, pp. 846-847 (1953). Congress responded to the federal courts' newly-declared power to enjoin actions by state officials in their enforcement of state legislative acts by enacting four major pieces of legislation.

In a footnote, the court specified the legislation:

> (1) Three-judge requirement of 1910 presently codified in 28 U.S.C. § 2281. [now repealed Pub. L. 94-381, §§ 1, 2 Aug. 12, 1976, 90 Stat. 1119.]
>
> (2) The stay requirement of 1913 presently codified in 28 U.S.C. § 2284 (last paragraph).
>
> (3) Johnson Act of 1934 prohibiting injunctions against state public utility rate orders—presently codified in 28 U.S.C. § 1342.
>
> (4) Tax Injunction Act of 1937—at issue in the instant case. [codified in 28 U.S.C. § 1341]

Id. at 325 and n. 9.

It therefore appears that § 1341 was part of a larger congressional response to *Ex parte Young, supra*, wherein Congress attempted to limit the injunctive power of federal courts.

The specific congressional policy considerations which underlie § 1341 are revealed in the Senate Judiciary Committee Report. In the report, two purposes of § 1341 are expressed. First, the statute was directed at the elimination of unjust discrimination between citizens of the State and foreign corporations. It was feared that a foreign corporation, through diversity, could obtain a federal injunction prohibiting the collection of certain state taxes. Such a procedure, however, was unavailable to a State resident. As the Senate Judiciary Committee Report stated:

> If those to whom the federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the federal courts need only pay what they choose and withhold the balance during the period of litigation.

S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). The second purpose of § 1341 was also directed at foreign corporations. The primary concern was that foreign corporations, by obtaining a federal injunction, could seriously disrupt the State taxing process. As the Senate Report stated it was possible for

> foreign corporations doing business in such States to withhold from them and their governmental subdivisions taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

In *Tramel v. Schrader*, 505 F. 2d 1310 (5th Cir. 1975), Judge Coleman, writing for the Fifth Circuit, summarized the congressional intent in enacting § 1341:

> In other words, in passing the Tax Injunction Statute, Congress took aim at two evils.
>
> First, Congress noted that some foreign corporations were in the habit of delaying the payment of taxes through an action in federal court since they could invoke diversity jurisdiction. State citizens, on the other hand, could not obtain a federal forum based on diversity jurisdiction. By passing the Tax Injunction Statute, Congress sought to treat the two classes, foreign corporations and resident citizens, alike.
>
> Second, Congress noted that allowance of injunction suits in the federal courts inevitably resulted in delays in the collection of public revenues by the state and local governments. Because of pressing need for the money, the state and local governments often had to compromise the claims, taking less than what was, in fact, due. By closing the federal courthouse door to taxpayer claims, Congress sought to end this burdensome disruption of local financing.

Id. at 1316. *See also Garrett v. Banford*, 538 F. 2d 63 (3d Cir. 1976).

It should be noted that the legislative history of § 1341 speaks only of the concerns that are encountered by the use of injunctions. No mention is made of the applicability of this statute to actions which seek other

relief. From a narrow reading of the statute one might infer that Congress intended to restrict only injunctive relief. However, as discussed earlier, this Court and several others have held that Congress' intention was best served by extending the jurisdictional bar of § 1341 to prohibit declaratory actions as well. *Illinois Central R. Co. v. Howlett*, 525 F. 2d 178 (7th Cir. 1975); *Gray v. Morgan*, 371 F. 2d 172 (7th Cir. 1966); *Hickmann v. Wujick*, 488 F. 2d 875 (2d Cir. 1973); *American Commuters Ass'n v. Levitt*, 405 F. 2d 1148 (2d Cir. 1969). These cases and others will now be analyzed to determine if the policy considerations and congressional intent of § 1341 would be served by extending the jurisdictional bar of the statute to prohibit damage actions as well.

Prior to the enactment of § 1341, a unanimous Supreme Court of the United States in *Matthews v. Rogers*, 284 U.S. 521 (1932), speaking through Mr. Justice Stone, discussed the sensitive nature of federal injunctions which enjoin the collection of a particular state tax:

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this court for review if any federal question be involved, Jud. Code § 237, *or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.* See *Boise Water Co. v. Boise City*, 213 U.S. 276; *Shelton v. Platt*, 139 U.S. 591; *Dows v. Chicago*, 11 Wall. 108, 110, 112. (emphasis added)

Id. at 525-526.

The Supreme Court's primary concern in *Matthews* centered on the exercise of a federal court's formidable injunctive powers. The opinion apparently would permit a plaintiff to maintain an action at law seeking only damages.

Later in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Supreme Court of the United States, speaking unanimously through Chief Justice Stone, extended the policy of self-restraint followed by courts in federal equity actions seeking to interfere with the collection of state taxes, a policy approved by Congress in its adoption of § 1341, to declaratory actions:

> It is true that the Act of Congress speaks only of suits "to enjoin, suspend, or restrain the assessment, levy, or collection of any tax" imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure.

Id. at 299.

More recently in *Perez v. Ledesma*, 401 U.S. 82 (1971), Mr. Justice Brennan, concurring in part and dissenting in part, reiterated the sensitive policy considerations underlying the federal courts' historic nonintervention in state tax matters:

> The special reasons justifying the policy of federal non-intervention with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and

> adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts. See generally S. Rep. No. 1035, 75th Cong., 1st Sess. (1937). These considerations make clear that the underlying policy of the anti-tax-injunction statute, 28 U.S.C. § 1341, relied on in *Great Lakes*, bars all anticipatory federal adjudication in this field, not merely federal injunctions.

Id. at 127-128 n. 17.

Several other courts have reached the same conclusions. *See Tramel v. Schrader*, 505 F. 2d 1310 (5th Cir. 1975); *Mandel v. Hutchinson*, 494 F. 2d 364 (9th Cir. 1974); *Hickmann v. Wujick*, 488 F. 2d 875 (2d Cir. 1973); *Bland v. McHann*, 463 F. 2d 21 (5th Cir. 1972); *American Commuters Assoc. v. Levitt*, 405 F. 2d 1148 (2d Cir. 1969).

Unlike the previous cases which have applied § 1341 and have prohibited equitable relief, two cases have reached different results. In *Wells v. Malloy*, 510 F. 2d 74 (2d Cir. 1975), the plaintiff brought an action to enjoin the enforcement of a section of the Vermont Motor Vehicle Purchase and Use Tax Statute. The plaintiff, an indigent, claimed that the sanction for nonpayment of the tax (suspension of his driver's license) violated his constitutional rights. The district court held that the action was barred by § 1341 and dismissed the complaint for want of jurisdiciton. The Second Circuit reversed.

Judge Friendly, writing for the court, found that the plaintiff was not seeking to restrain the "assessment" or "levy" of a tax under state law. Indeed the plaintiff did not dispute that the tax was due and owing. Nor was the plaintiff's action an attempt to restrain the "collection" of a state tax. Judge Friendly, after examining the legislative history of § 1341, determined that the sanction for nonpayment of the Vermont tax was not encompassed in the term "collection" of § 1341:

> The context and the legislative history, see H.R. Rep. No. 1503, 75th Cong., 1st Sess. 2 (1937); Sen. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937); 81 Cong. Rec. 1415, 1416 (Feb. 19, 1937) (remarks of Sen. Bone), lead us to conclude that, in speaking of "collection", Congress was referring to methods similar to assessment and levy, *e.g.*, distress or execution, compare Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. (59 U.S.) 272, 278, 15 L. Ed. 372 (1856); Damsky v. Zavatt, 289 F. 2d 46, 50-51 (2d Cir. 1961), that would produce money or other property directly, rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed upon them—not to a case where a taxpayer contended that an unusual sanction for non-payment of a tax admittedly due violated his constitutional rights, an issue which, once determined, would be determined for him and all others.

Id. at 77.

Thus despite the fact the plaintiff did not pursue any state remedies, the court held that § 1341 did not bar his action.

In *Hargrave v. McKinney*, 413 F. 2d 320 (5th Cir. 1969), the Fifth Circuit held that § 1341 did not bar an action which challenged the constitutionality of a Florida statute.

After analyzing these cases it is clear that § 1341 bars any action which seeks equitable relief which if granted would disrupt the state taxing process. Thus an action which seeks to enjoin the "assessment, levy or collection of any tax under state law" may be prohibited. Likewise, an action which seeks a declaratory judgment may also be barred, since a declaration that a particular state tax statute is unconstitutional would have a crippling effect upon the state taxing process. So long as the states provide plaintiffs with a "plain, speedy and efficient remedy" in the state courts, the plaintiffs are precluded from pursuing equitable relief in federal courts.

The cases in this circuit are in accord. *28 East Jackson Enterprises, Inc. v. Cullerton*, 523 F. 2d 439 (7th Cir. 1975), on second petition for rehearing, 551 F. 2d 1093 (7th Cir. 1977); *Illinois Cent. R. Co. v. Howlett*, 525 F. 2d 178 (7th Cir. 1975); *Gray v. Morgan*, 371 F. 2d 172 (7th Cir. 1966). In each case, the plaintiffs were seeking some form of equitable relief which, if granted, would have disrupted the state taxing process. In *Cullerton, supra*, the plaintiffs were seeking an injunction. In *Illinois Cent. R. Co., supra*, the plaintiffs were seeking a declaratory judgment. In *Gray, supra*, the plaintiffs were seeking an injunction, declaratory judgment and a tax refund. In each case this court determined that the plaintiffs had an adequate state remedy and held that § 1341 barred the action. As Chief Judge Hastings stated in *Gray*:

> We hold that § 1341 means what it says, and having determined to our own satisfaction that plaintiffs have available to them a plain, speedy and efficient remedy in the Wisconsin state courts, they may not use a federal forum to seek the equitable relief sought here against the state income taxes in question.

371 F. 2d at 175.

IV.

In the present case the plaintiff argues that the significant difference is the relief sought. Fulton concedes that were it seeking some form of equitable relief § 1341 would bar its suit. However, since it seeks damages for the allegedly wrongful conduct of officials, Fulton argues that § 1341 or its underlying policy considerations are inapplicable. Furthermore, Fulton contends that the purpose of § 1983 suits would be thwarted if § 1341 were construed to bar damage actions as well.

This court agrees with the plaintiff's argument. As has been demonstrated, § 1341 is directed at prohibiting equitable relief. The statute, its legislative history and significant cases indicate that the primary evil to be avoided is federal equitable relief which would disrupt the state taxing process. A federal court injunction or declaratory judgment would not only undermine and jeopardize a state's ability to collect its revenue but would also seriously damage the delicate balance inherent in our federalistic system of government.

These concerns are not present in a suit for damages. In the present case the plaintiff is not seeking to enjoin any taxing process. Nor will a judgment for the plaintiff have that effect. Fulton is seeking damages for the alleged wrongful and intentional conduct of certain officials who allegedly deprived Fulton of constitutional rights while acting under color of state law. Fulton seeks relief which is retrospective, i.e., compensation for harm done, unlike equitable relief which is anticipatory or prospective. Additionally, the outcome of the present suit does not pivot upon the construction of some state statute or tax regulation which should more properly be construed by appropriate state courts. The issue is not whether a state statute is constitutionally valid but rather whether an official's conduct violated established constitutional standards. This is precisely the purpose of § 1983 suits. As Mr. Justice Douglas stated, writing for the Supreme Court of the United States in *Monroe v. Pape*, 365 U.S. 167 (1961):

> There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. See *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287-296.

Id. at 171-172.

Later, in *Mitchum v. Foster*, 407 U.S. 225 (1972), the Supreme Court of the United States reiterated that position:

> Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

Id. at 239 (footnote omitted).

And more recently in *Carey v. Piphus*, ... U.S. ....., 46 U.S.L.W. 4224 (March 21, 1978), Mr. Justice Powell writing for the court stated:

> The legislative history of § 1983, elsewhere detailed, *e.g.*, *Monroe v. Pape*, 365 U.S. 167, 172-183 (1961); *id.*, at 225-234 (Frankfurter, J., dissenting in part); *Mitchum v. Foster*, 407 U.S. 225, 238-242 (1972), demonstrates that it was intended to "create[] a species of tort liability" in favor of persons who are deprived of "rights, privileges, or immunities secured" to them by the Constitution. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

Id. at 4225-26.

It should be noted that the fact that the plaintiff in this suit is a corporation is of no legal significance. While a corporation is not a "citizen" within the meaning of the privileges and immunities clause, *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *Orient Ins. Co. v. Daggs*, 172 U.S. 561 (1899); *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1868); *see also Asbury Hospital v. Cass County, N.D.*, 326 U.S. 207 (1945), a corporation is a "person" within the meaning of the equal protection and due process of law clauses of

the Fourteenth Amendment, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Adams v. City of Park Ridge*, 293 F. 2d 585 (7th Cir. 1961); *Advocates for Arts v. Thompson*, 532 F. 2d 792 (1st Cir. 1976); *Raymond Motor Transportation, Inc. v. Rice*, 417 F. Supp. 1352 (3-Judge Dist. Ct. W.D. Wis. 1976). Accordingly, Fulton, the corporate plaintiff, may maintain a § 1983 action to secure the protection and guarantees accorded to it under the Fourteenth Amendment.

Furthermore, as announced in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), the distinction between personal liberties and proprietary rights as a guide to the contours of a § 1343(3) jurisdiction is likewise meaningless. It is true that the Supreme Court in *Lynch* in footnote 6 indicated an exception to this rule in cases which were barred by § 1341. However, since this court has already determined that § 1341 is inapplicable, the exception alluded to in the footnote in *Lynch* is likewise inapplicable.

The defendants argue that the policy considerations of § 1341 would be best served by this court holding that § 1341 bars all actions, equitable and legal. We cannot agree. After reviewing the statute, its legislative history and significant cases we can find no evidence which would indicate that § 1341 was directed at damage actions as well as equitable actions. Clearly if Congress had intended to prohibit all federal court relief in state tax matters, it could have done so. Congress, however, did not address the subject of damage actions. Congress thus did not give state tax officials absolute immunity for acts committed in their official capacity. Congress only prohibited certain specific remedies which due to their nature are highly disruptive of state proceedings. Quite clearly, if a county or state tax official intentionally and unjustifiably raised an individual's property assessment merely because of the individual's race, ethnic background or political affiliation, the official could be liable for damages under § 1983 for the misuse of his authority. Section 1341 only bars certain forms of relief; it does not serve to deprive a federal court of jurisdiction of all actions merely because the defendant is a state or county tax official. If a state or county tax

official intentionally violates a plaintiff's constitutional rights, he may be held liable for an action for damages.

We note that in a recent decision of this court the point we decide today was assumed by the parties and the court. In *Sacks Brothers Loan Co. v. Cunningham*, (No. 77-1729, May 24, 1978), the plaintiff filed an action against the tax assessor of Marion County, Indiana seeking damages and equitable relief pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The gravamen of the complaint was that the imposition of an Indiana personal property tax on certain tangible personal property held by the plaintiff violated the plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment. The district court dismissed the plaintiff's claim for equitable relief relying upon 28 U.S.C. § 1341 and dismissed the claim for damages for failure to state a claim upon which relief can be granted. This court affirmed the district court's denial of equitable relief but reversed the district court's dismissal of the plaintiff's damage action on the ground that the district court had applied the incorrect statute of limitations for damage actions arising under § 1983. In so doing, this court necessarily assumed the existence of a § 1983 cause of action for damages against a county tax assessor.

While we now hold that § 1341 does not bar a § 1983 action for damages, that is not to say that whenever a tax official raises a property assessment he exposes himself to a § 1983 suit. In order to insure that county or state tax officials will not exercise their legitimate discretion with undue timidity for fear of suit, they are entitled to a good faith defense as announced in *Wood v. Strickland*, 420 U.S. 308 (1975). Therefore, we hold that a state or county tax official will be liable for damages under § 1983 only if he violated the plaintiff's clearly established constitutional rights intentionally or with reckless disregard of those rights. Inadvertence or negligence will not be enough. Thus, to paraphrase *Wood v. Strickland*, *supra*, a compensatory award will be appropriate only if the tax official has acted with an impermissible motivation or with such intentional or reckless disregard of the plaintiff's clearly established

constitutional rights that his action cannot be reasonably characterized as being in good faith. *Id.* at 332. *See also Procunier v. Navarette*, ... U.S. ....., 46 U.S.L.W. 4144 (Feb. 22, 1978).

Furthermore, while we now hold that the plaintiff has stated a cause of action under § 1983, we leave for the district court to determine on a more complete record whether any of the defendants have had the necessary personal involvement to incur liability. As this court has held in *Adams v. Pate*, 445 F. 2d 105 (7th Cir. 1971), there is no vicarious liability under § 1983; *respondeat superior* is inapplicable. *See also Monell v. Department of Social Services of the City of New York*, ... U.S. ....., 46 U.S.L.W. 4569 (June 6, 1978); *Draeger v. Grand Central, Inc.*, 504 F. 2d 142 (10th Cir. 1974); *Johnson v. Glick*, 481 F. 2d 1028 (2d Cir. 1973); *Jennings v. Davis*, 476 F. 2d 1271 (8th Cir. 1973). Accordingly, any defendant who did not personally and intentionally or with reckless disregard violate the plaintiff's constitutional rights will not be held liable for damages. This is a matter which the district court must address on remand and may address preliminarily to any trial on the merits.

Another issue the district court will address on remand is whether any of the plaintiff's claims is barred by the appropriate statute of limitations. Since the district court dismissed the plaintiff's complaint relying upon 28 U.S.C. 1341, it never reached the statute of limitations question. Although the defendants have argued the question on appeal, we feel the better course, in light of our opinion today, is to permit the district court to address the issue upon a more complete record and following our decision in *Beard v. Robinson*, 563 F. 2d 331 (7th Cir. 1977). Therefore, on remand, the district court must decide this statute of limitations question on a fully developed record.

The defendants also argue that even if the plaintiff has stated a cause of action under § 1983 that the district court should abstain or defer because the plaintiff has not exhausted his state remedies. We find no merit in this argument and see no reason why this § 1983 action should be treated differently from others where exhaustion is not required. As stated in *Monroe v. Pape*, 365 U.S. 167 (1961), referring to § 1983 actions:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

Id. at 183.

See also McNeese v. Board of Ed. for Com. Unit. Sch. Dist. 187, 373 U.S. 668 (1963); *Drexler v. Southwest Dubois School Corp.*, 504 F. 2d 836 (7th Cir. rehearing en banc 1974). Even if § 1983 were a supplementary remedy, *see Askew v. Hargrave*, 401 U.S. 476 (1971), the unavailability in the Illinois courts of certain elements of plaintiff's damage, i.e., interest and attorneys' fees, would make the federal remedy necessary to afford complete relief.

Accordingly, in light of all the foregoing, we now hold that the plaintiff, Fulton Market Cold Storage Company, has stated a cause of action under 42 U.S.C. § 1983 which is not barred by 28 U.S.C. § 1341. The order of the district court is therefore now REVERSED and the case now REMANDED for proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed January 12, 1977]

ORDER

The Court does this day hereby enter its Memorandum Order. The Plaintiff's amended complaint is hereby dismissed. (see Memorandum order for complete details)

January 7, 1977 /s/ Leighton, Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed January 12, 1977]

MEMORANDUM ORDER

Plaintiff Fulton Market Cold Storage Company, an Illinois corporation which owns real estate situated in Chicago, brings this civil rights action in a four-count complaint against defendants, pursuant to 42 U.S.C. §1983, the Due Process and Equal Protection clauses of the 14th amendment to the U.S. Constitution. It complains that since 1958, its real estate has been systematically and unlawfully over-assessed and over-taxed in violation of rights secured by the 14th amendment, the due process-equal protection provision of the Illinois Constitutions of 1870 and 1970, the Revenue Act and Article IX, section 1 of the Illinois Constitution of 1870. It claims that real estate situated in Cook County has not been assessed at a uniform level as required by law; that the system of assessments administered by defendants results in illegal, discriminatory, and disparate assessments; and that since 1958, its property has been assessed at levels which generally exceed those at which other property is assessed. Plaintiff claims that it has sought relief from these illegal assessments, but to no avail. Accordingly, it files this amended complaint asking this court for judgment in the amount of $60,000 from each defendant, reimbursement for sums expended from 1958 through 1974 in seeking redress from their acts, consequential and punitive damages, costs, and such other relief as may be just. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §§1331 and 1343; the amount in controversy allegedly exceeds $10,000, exclusive of interest and costs.

In Count I, plaintiff seeks relief against defendants Cullerton and Tully, claiming that as assessors of Cook County they have continuously, systematically, and illegally assessed property in the county at disparate and discriminatory levels since 1958. In Count II, plaintiff seeks relief against defendants Keane, Korzen, Semrow, and Zaban allegedly members of the Cook County Board of Appeals, for their failure to discharge their duty to review and correct unlawful assessments made by the Cook County Assessor. Plaintiff alleges that it sought relief from the Board in 1968, 1970 and thereafter; and that its failure to take remedial action perpetuated the discriminatory and illegal assessments existing in Cook County to plaintiff's detriment. In Count III, plaintiff seeks relief from defendants Korshak, Jones, and Mahin, who, as directors of the Illinois Department of Revenue, allegedly failed to discharge their duty to equalize total assessments in Cook County and order reassessment of property in any year in which assessments were not in compliance with the law, a duty allegedly imposed on them by law until 1970. In Count III, plaintiff seeks relief against defendants Lenhausen and Kirk who, as directors of the Illinois Department of Local Affairs, succeeded to this duty and allegedly failed to discharge their responsibilities. Finally, in Count IV, plaintiff alleges a general conspiracy count against all defendants for their promulgation of, and acquiescence in, the illegal system of assessments in effect from 1958 through 1974.

The cause is before the court on a series of defendants' motions attacking plaintiff's amended complaint. Defendant Cullerton moves to strike and dismiss on the ground that actions involving assessments do not fall within the purview of 28 U.S.C. §1343 and 42 U.S.C. §1983; that this court should abstain from exercising jurisdiction; that jurisdiction is barred by principles underlying 28 U.S.C.

§1341; that the complaint fails to state a claim upon which relief can be granted; and that the complaint fails to state a substantial federal question. Defendants Tully, Semrow, and Zaban have adopted Cullerton's motion; and in addition, argue that the complaint, as to them, fails to state a claim on which relief can be granted, and that plaintiff's action, to the extent it seeks relief for assessments made in 1969, is barred by the doctrine of *res judicata* arising from *People ex rel. Korzen* v. *Fulton Market Cold Storage Co.*, 62 Ill. 2d 443, 343 N.E. 2d 450 (1976). Defendants Korshak and Kirk, in a motion adopted by defendants Lenhausen, Mahin, and Jones, move to dismiss Counts III and IV, arguing: that the action is barred by principles of *res judicata*, collateral estoppel, and comity; that state defendants are immune from suit under provisions of the 11th amendment of the U.S. Constitution; that suit is barred by principles codified by 28 U.S.C. §1341 or principles of abstention; that suit is barred by the applicable statute of limitations and the doctrine of laches; and that plaintiff's action is barred by its failure to exhaust proscribed administrative remedies. Finally, defendants Keane and Korzen adopt the motion to dismiss filed by defendants Cullerton, Tully, Semrow and Zaban, and argue further that the action is barred by the applicable statute of limitations, and by laches.

From an examination of the amended complaint, it appears that plaintiff is asking this court to interject itself into the realm of state procedures of taxation, to find that the manner in which assessments were made were illegal, and to order relief in violation of principles underlying 28 U.S.C. §1341. After consideration of the motions and briefs of the parties, the court concludes that plaintiff's amended complaint must be dismissed.

The Johnson Act, 28 U.S.C. §1341, on its face prohibits a district court from enjoining the collection or assess-

ment of a state tax when there exists a plain, speedy, and efficient remedy under state law. And it has been held that the underlying policy of 28 U.S.C. §1341 applies with equal force against federal courts' granting declaratory judgment relief in similar circumstances. See *Great Lakes Dredge and Dock Co.* v. *Huffman,* 319 U.S. 293 (1943); *City of Houston* v. *Standard-Triumph Motor Co.,* 347 F. 2d 194 (5th Cir. 1965), *cert. denied,* 382 U.S. 974 (1966). As a broad doctrine, this act has been construed to embody the principle that federal courts should not interfere with matters of state taxation. See *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F. 2d 439 (7th Cir. 1975), *cert. denied* 423 U.S. 1073 (1976).

Therefore, in the judgment of this court, the principles underlying enactment of 28 U.S.C. §1341 apply to bar this suit. Plaintiff seeks relief in this court without having availed itself of all plain, speedy, and efficient remedies provided by Illinois administrative and judicial procedures. See *People ex rel. Korzen* v. *Fulton Market Cold Storage Co.,* 62 Ill. 2d 443, 343 N.E. 2d 450 (1976), *cert. denied* 45 L.W. 3250; *Goodfriend* v. *Board of Appeals of Cook County,* 15 Ill. App. 3d 861, 305 N.E. 2d 404 (1973). With due consideration to the peculiar needs of state tax administration, the court concludes that to allow plaintiff's suit to proceed on this amended complaint would subvert the orderly administration of state revenue procedures and violate established principles of comity. See *Perez* v. *Ledesma,* 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring and dissenting in part.) Therefore it is ordered that plaintiff's amended complaint be dismissed.

So ordered

/s/ George N. Leighton
United States District Judge

Dated: January 7, 1977

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed May 17, 1976]

FIRST AMENDED COMPLAINT

Plaintiff, Fulton Market Cold Storage Company ("Fulton") complains of defendants, P. J. Cullerton, Thomas M. Tully, George M. Keane, Bernard J. Korzen, Harry H. Semrow, Seymour Zaban, Marshall Korshak, Theodore A. Jones, George Mahin, Robert J. Lenhausen and Frank A. Kirk as follows:

The Parties

1. Fulton is an Illinois corporation owning a cold storage warehouse and having its principal place of business in Chicago, Illinois.

2. P. J. Cullerton was Assessor of Cook County, Illinois from 1958 to 1974. As Assessor he had the duty to assess for taxation all real and personal property, not exempt, located in Cook County.

3. Thomas M. Tully has been Assessor for Cook County, Illinois since December 1974 and prior thereto Deputy Assessor. As Assessor Tully's duties have been the same as those of his predecessor Cullerton.

4. The following defendants have been members of the Cook County Board of Appeals for the periods shown:

George M. Keane	1967-1972
Bernard J. Korzen	1967-1970
Harry H. Semrow	1971 to present
Seymour Zaban	1973 to present

As members of the Board of Appeals, these defendants had the duty to review and order corrected all unlawful assessments brought before them on complaint of the taxpayer and to order the Cook County Assessor to correct mistakes and errors in such assessments.

5. The following defendants have been Directors of the Illinois Department of Revenue for the periods shown:

Marshall Korshak	1965-1967
Theodore A. Jones	1967-1968
George Mahin	1969-1972

As Director, these defendants, until 1970, had the duty to equalize the total assessed valuations of the several counties so that such total assessed valuations as equalized equaled the full cash value of the property subject to assessment within the several counties and the duty to order a reassessment for any year in which they found that the assessments in any county were not in substantial compliance with law. In 1970 and thereafter these duties were assumed by the Illinois Department of Local Government Affairs.

6. Robert J. Lenhausen was Director of the Illinois Department of Local Government Affairs from 1970 to 1972 when he was succeeded by the present director Frank A. Kirk.

7. At all times and for all purposes here in question, each defendant acted under color of law, *viz* 120 Ill. Rev. Stat. §482 *et seq.*, commonly known as the Illinois Revenue Act of 1939, as amended, ("the Revenue Act") and the Illinois Constitutions of 1870 and of 1970.

Jurisdiction And Venue

8. Jurisdiction is based on 28 U.S.C. §1343 which gives federal courts jurisdiction over damage actions under 42 USC §1983 against persons who have violated civil rights

under color of state law. Jurisdiction is also based on 28 USC §1331 in that the matter in controversy arises under the United States Constitution and the amount in controversy exceeds $10,000 exclusive of interest and costs. Venue lies under 28 USC §1391.

Count I

As to Cullerton and Tully plaintiff alleges:

9. From 1958 to 1971 Cullerton was required by the Revenue Act and the Illinois Constitutions of 1870 and 1970 to assess for taxation all real and personal property not exempt, located in Cook County at 100% of full cash value, and from 1971 to 1973 at 50% thereof.

10. Under the Revenue Act taxes constitute a lien on property as of January 1 in the year of levy. The imposition of such lien diminishes the value of property and constitutes a taking thereof.

11. From 1958 to date, plaintiff has been the owner of improvements to real estate at 1000 Fulton Market, Chicago, Cook County, Illinois consisting of a 10-story cold storage warehouse and peripheral structures. Plaintiff is the lessee under a long term ground lease of the underlying fee. Under the lease terms, plaintiff is obligated to pay all real estate taxes levied against the property.

12. Cullerton assessed plaintiff's property for 1969 at a valuation of $1,080,785, or at approximately 70% of full cash value. Application of the multiplier of 1.52 for 1969 resulted in an equalized valuation of $1,642,798, or, within limits of assessment accuracy, approximately 100% of full cash value. Based on this equalized valuation and the tax rate for Chicago for 1969, plaintiff was required to pay and did pay taxes in the amount of $108,128.64.

13. In making plaintiff's assessments for 1958-1973, Cullerton systematically, knowingly, intentionally, fraudulently and invidiously discriminated against plaintiff and took plaintiff's property without due process of law in violation of plaintiff's rights under the Due Process and Equal Protection clauses of the 14th Amendment of the U.S. Constitution, the Due Process provisions of the Illinois Constitutions of 1870 and 1970, the Revenue Act and Article IX, Section 1 of the Illinois Constitution of 1870. Such discrimination and unlawful taking occurred, in part, as follows:

a) Between 1958-73 Cullerton systematically and continuously assessed properties in Cook County so that property generally was assessed at between 20 and 35% of fair cash value notwithstanding he was required by law to assess all property at 100% of fair cash value between 1958-1971 and at 50% thereof from 1971-1973. During the entire period Cullerton systematically and continuously assessed tens of thousands of properties in Cook County at more than 200% the level at which property generally in Cook County was assessed although required by law to assess at a uniform level. Each year between 1958-1973 Cullerton assessed plaintiff's property greatly in excess of the level at which property generally was assessed in Cook County in those years. In 1968 and 1969 Cullerton assessed plaintiff's property at two and one-half times the level at which property was generally assessed in Cook County in those years.

b) Cullerton had full knowledge that he was assessing property generally at substantially less than 100% of full cash value from 1958-71 and at substantially

less than 50% of full cash value from 1971-1973 and that there existed during the entire period enormous disparities in the levels of assessment of property within Cook County:

i) Cullerton's records for the years 1958-1973 show these undervaluations and disparities.

ii) Each year between 1958-1973, the Illinois Department of Local Government Affairs (or its predecessor in function the Illinois Department of Revenue) advised Cullerton of these undervaluations and disparities.

iii) Each year between 1958-1973 not less than five thousand taxpayers advised Cullerton, in seeking relief from him, of his discrimination against them by virtue of these undervaluations and disparities.

iv) Each year between 1958-1973, from five to fifteen thousand taxpayers advised the Cook County Board of Appeals in writing, in seeking relief from it, of Cullerton's discrimination against them by virtue of these undervaluations and disparities. In each case, the Cook County Board of Appeals notified Cullerton of the alleged discrimination.

v) In 1968 plaintiff notified the Cook County Board of Appeals of the discrimination being practiced against it and the Board advised Cullerton thereof.

vi) Since 1967, Cullerton has had actual knowledge of the full cash value of every parcel of real estate sold in Cook County in an arms length sale.

c) Cullerton willfully and purposefully intended to practice and to continue to practice the foregoing system

of illegal undervaluation and discriminatory assessments.

i) Although advised each year by his own records, and notified by the Illinois Department of Local Government Affairs (or its predecessor), the Cook County Board of Appeals, thousands of taxpayers, and by tens of thousands of Real Estate Transfer Declarations of his systematic undervaluations and discriminatory assessments, Cullerton willfully failed and refused to correct these practices in the years they occurred and to prevent them from re-occurring in subsequent years.

ii) In 1968 Cullerton refused to correct the 250% disparity between plaintiff's assessment and the average assessment level for that year in Cook County or to prevent the same discrimination from occurring the following year and each year thereafter through 1974.

iii) Cullerton repeatedly and publicly stated in writing during the period in question that his assessments intentionally discriminated in favor of homeowners by assessing their properties at less than one-half the level at which he assessed all other properties.

d) Cullerton's foregoing systematic, knowing and intentional discrimination, generally and as practiced upon the plaintiff in 1968 and 1969, has been declared by Illinois courts to be illegal and fraudulent as a matter of fact and of law.

14. Tully knowingly and willfully participated in the foregoing unlawful acts and course of conduct committed

by Cullerton and from 1974 and thereafter maintained and continued the same system of illegal undervaluations and discriminatory assessments.

15. The foregoing illegal acts and course of conduct have damaged plaintiff. Such damages include, *inter alia*, the amount (over $60,000) by which the tax levy for 1969 on plaintiff's property exceeded the levy which would have obtained but for such acts and conduct, the sums expended by plaintiff in the years from 1958 to 1974 in seeking redress from such acts and conduct, and the dislocation to plaintiff's business resulting therefrom.

Count II

As to Keane, Korzen, Semrow and Zaban, plaintiff alleges:

1-14. Plaintiff realleges paragraphs 1 through 14 of Count I.

15. In 1968 and in 1970 and all years thereafter plaintiff filed a complaint with the Board of Appeals of Cook County, on which these defendants sat from time to time, alleging that Cullerton's assessments of its property were discriminatory and seeking relief therefrom. The Board of Appeals denied plaintiff the relief to which it was entitled by law.

16. In denying plaintiff relief, the Board of Appeals systematically, knowingly, intentionally, fraudulently and invidiously discriminated against plaintiff and took plaintiff's property without due process of law in violation of plaintiff's rights under the Due Process and Equal Protection clauses of the 14th Amendment of the U.S. Constitution, the Due Process provisions of the Illinois Constitutions of 1870 and 1970, the Equal Protection provision of the Illinois Constitution of 1970, the Revenue Act and Ar-

ticle IX, Section 1 of the Illinois Constitution of 1870. Such discrimination and unlawful taking occurred, in part, as follows:

a) The Board of Appeals had knowledge that tens of thousands of properties in Cook County (including plaintiff's property) were assessed at substantially less than 100% of full cash value between 1958-1971 and at substantially less than 50% of full cash value between 1971-1973 and that during the entire period there existed enormous disparities in the levels of assessment of property within Cook County.

i) Each year between 1958-1973, the Illinois Department of Local Government Affairs (or its predecessor in function the Illinois Department of Revenue) advised the Board of Appeals of these undervaluations and disparities.

ii) Each year between 1958-1973, from five to fifteen thousand taxpayers advised the Cook County Board of Appeals in writing, in seeking relief from it, of Cullerton's discrimination against them by virtue of these undervaluations and disparities.

b) The Board of Appeals willfully intended to practice and to continue to practice the foregoing system of illegal undervaluations and discriminatory assessments. Although notified each year by the Illinois Department of Local Government Affairs (or its predecessor) and by thousands of taxpayers of the systematic undervaluations and discriminatory assessments in Cook County, and being privy to the information contained in the Real Estate Transfer Declarations, the Board of Appeals willfully refused to correct the systematic undervaluations or discriminatory assessments brought before them by complaint and instead aggravated these evils and their discriminatory affect upon plaintiff by illegally lowering the assessments of certain taxpayers whose assessments were already substantially below the level required by law.

c) The foregoing systematic, willfull and intentional discrimination is illegal and fraudulent as a matter of fact and state law.

17. Plaintiff realleges Paragraph 15 of Count I.

Count III

As to Korshak, Jones, Mahin Lenhausen and Kirk, plaintiff alleges:

1-16. Plaintiff realleges paragraphs 1 through 14 of Count I and paragraphs 15 and 16 of Count II.

17. Every year from 1958-1974 Korshak, Jones, Mahin, Lenhausen and Kirk ("Kirk and his predecessors in function") while holding the offices described in paragraphs 5 and 6 of Count I, in connection with the discharge of their duties to equalize tax assessment levels among the several counties, have had full knowledge that the average assessment for property in Cook County has been between 20-35% of full cash value although required by law to be 100% (or 50% as the case may be) of full cash value and that tens of thousands of properties in Cook County were assessed at more than 200% the average level of assessment in Cook County although required by law to be assessed at a uniform level. This knowledge was derived in part from official ratio studies prepared by these defendants pursuant to the Revenue Act which show Cullerton's systematic undervaluation and discriminatory assessments of property in Cook County.

18. Notwithstanding the foregoing, Kirk and his predecessors in function failed and refused to determine a multiplier which would result in an assessment level for Cook County at full fair cash value or to order reassessments in Cook County, or to take other remedial action, to correct discriminatory disparities in assessments in Cook County. On the contrary, in 1967 Korshak, and thereafter Jones, Mahin, Lenhausen and Kirk established a formal policy in their Departments to equalize at 50% in contravention of the laws. Under the circumstances Kirk and his predecessors in function have, by such failure and refusal, systematically, knowingly, intentionally, fraudulently and invidiously discriminated against plaintiff and taken plaintiff's property without due process of law in violation of plaintiff's rights under the Due Process and Equal Protection clauses of the 14th Amendment of the U.S. Constitution, the Due Process provisions of the Illinois Constitutions of 1870 and 1970, the Equal Protection provision of the Illinois Constitution of 1970, the Revenue Act and Article IX, Section 1 of the Illinois Constitution of 1870.

19. Plaintiff realleges paragraph 15 of Count I.

Count IV

As to all defendants, plaintiff alleges:

1-18. Plaintiff realleges paragraphs 1-14 of Count I, paragraphs 15 and 16 of Count II, and paragraphs 17 and 18 of Count III.

19. Each defendant under the authority conferred upon him by law had the duty and power to prevent and/or correct the systematic undervaluations and discriminatory assessments prevailing in Cook County between 1958-1974.

20. Under color of law each defendant knowingly, intentionally and purposefully agreed, combined and conspired with, and aided and abetted, each other defendant to maintain such systematic undervaluations and discriminatory assessments and thereby to deprive tens of thousands of Cook County taxpayers, including plaintiff, of their property without due process of law and to deny these taxpayers equal protection of the law in violation of plaintiff's rights under the Due Process and Equal Protection clauses of the 14th Amendment of the U.S. Constitution, the Due Process provisions of the Illinois Constitution of 1870, the Equal Protection provision of the Illinois Constitution of 1970, the Revenue Act and Article IX, Section 1 of the Illinois Constitution of 1870.

21. Plaintiff realleges paragraph 15 of Count I.

Wherefore, plaintiff prays:

a) For judgment against the defendants, and each of them, for $60,000 plus the sums expended by plaintiff in the years 1958 through 1974 in seeking redress from the acts and conduct of defendants, plus the damage to plaintiff's business resulting thereonfrom, plus its costs.

b) For punitive damages in the amount of $250,000.

c) For such other and further relief as may be just.

Fulton Market Cold Storage Company
By /s/ James L. Fox
Its Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed January 29, 1974]

MOTION OF DEFENDANT, P. J. CULLERTON, ASSESSOR OF COOK COUNTY, TO STRIKE AND DISMISS

Now Comes the defendant, P. J. Cullerton, Assessor of Cook County, by his attorney, Bernard Carey, State's Attorney of Cook County, and moves this Court for entry of an order striking the Complaint and dismissing the cause of action and in support thereof states as follows:

1. This Court should decline to exercise jurisdiction in the instant cause:
   - A. Actions involving assessments do not fall within the purview of 28 USC 1343 and 42 USC 1983;
   - B. This Court should abstain from taking jurisdiction;
   - C. Jurisdiction is barred by §1341;
   - D. This Court should otherwise decline jurisdiction;

2. The Complaint otherwise fails to state a cause of action;

3. There is no substantial federal question involved in this cause of action.

Bernard Carey,
State's Attorney of Cook County
By: /s/ Donald P. Smith
Assistant State's Attorney

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MOTION TO DISMISS

Now Come the defendants, Thomas M. Tully, County Assessor of Cook County, Illinois and Harry M. Semrow and Seymour Zaban, members of and constituting the Board of Appeals of Cook County, Illinois, by their attorney, Bernard Carey, State's Attorney of Cook County, Illinois, and move this court for the entry of an order dismissing this action, and in support thereof state:

1. The defendants adopt and reallege the allegations contained in the Motion to Dismiss previously filed herein by the defendant, P.J. Cullerton, as if the same were fully set forth herein.

2. This action, as it relates to the assessment and extension of real estate taxes for the year 1969 is barred by the decision of the Illinois Supreme Court in *People ex rel. Korzen* v. *Fulton Market Cold Storage Company*, 62 Ill.2d 443 (1976).

3. The Amended Complaint fails to state a claim upon which relief may be granted, to wit: the assessment practices challenged by the plaintiff are neither the product of invidious discrimination, nor are they based upon an unreasonable classification of property for the purposes of taxation.

Wherefore, the defendants, Thomas M. Tully, Harry H. Semrow and Seymour Zaban, pray this court to enter an order dismissing this action.

Respectfully submitted,

Bernard Carey
State's Attorney of Cook County
By: /s/ Alan L. Fulkerson
Assistant State's Attorney
500 Chicago Civic Center
Chicago, Illinois 60602
443-5473